IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.327 OF 2006

Konkan Railway Corporation Ltd. ...Petitioner

vs.

Gammon India Ltd. ...Respondent.

Ms.Kiran Bhagadia i/b. Ms.Asha Bhambwani, for petitioner.

Mr.S.C.Gupte i/b. M/s.Warekar & Warekar, for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 16th November,2006..

P.C.:-

1. By this petition filed under Section 34 of the Arbitration and Conciliation Act, the petitioner challenges the award made by the arbitral tribunal.. The petitioner has challenged the award made against claim nos.5.6. and 8. The claim no.5 was for refund of electricity consumption charges. According to the respondent who was the claimant before the Arbitral Tribunal it was not liable to pay the

electricity consumption charges but the petitioner deducted the electricity consumption charges and therefore, it was entitled to refund of the same. The case of the petitioner was that as per the terms of the contract it was the duty of the respondent to maintain the site facilities and to incur necessary expenses for that purpose, and therefore, the respondent was liable to pay electricity consumption charges. The petitioner also relies on the correspondence exchanged between the parties to show that even the respondent did not dispute that it is liable to pay electricity consumption charges. The Award made by the learned Arbitrator in this regard reads as under:-

> "5.5 Refund of recoveries wrongly effected from RA Bills/Escalation Bills towards electricity charges. Total of Claim No.5 = Rs.1,31,58,563/- .
>
> (a) The Para 10.5 of SCC provided that on provision of power supply by the Respondents as committed by them in Para 10.2 & 10.3 of SCC, all charges connected with tapping/developing and maintaining site facilities were to be borne by the Claimants. It had no where been specifically mentioned that charges of power supplied for work would be at the cost of the Claimants.
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> (b) The Respondents had submitted that words 'all charges' mentioned in Para 10.5 of SCC would naturally include power charges also as they were committed only to provide power supply

points at location described in Para 2.5, 206 & 2.10.2 of Appendix 'A' to the Contract Agreement.

(c) The Claimants during the course of proceedings submitted that provision of recovery for power supplied to the Contractors was expressly mentioned in some contracts for tunneling works of the Respondents. The Respondents in compliance to Para 3 of Minutes of Final Meeting held at Mumbai on September17, 2005, submitted details of three contracts of similar works viz. No.KR/RN/W/C/(TUN)3/91 of 19.11.91; No.KR/RS/W/Contract/28(TUN)/91 of 27.11.91 and No.KR/CE/KAW/W/Contract/36/91 of 17.09.91 and all these hand express provisions for recovery of electric energy consumption charges.

(d) After hearing and comprehending the submissions and arguments of both the parties, the Tribunal is of the view that tapping/developing would mean nothing more than provision of basic infrastructural facilities to permit flow of electric energy to work locations. Similarly the maintenance would carry connotation of maintaining these infrastructural facilities only and not the payment for energy consumption. Tribunal observed that in other contemporary contracts express provisions have been made for recovery of electricity charges and there is no such provision for recovery of electric energy consumption charges in the present contract. Hence, Tribunal decides that the recovery made is illegal and the Claimants are entitled for

refund of recoveries made from their RA Bills in this regard.

(e) Amount awarded for Claim No.5=Rs.1,31,58,563/- say Rs.131.58 lacs."

Perusal of the above quoted Award shows that the learned Arbitrator has observed that the terms of the contract do not specifically mention that electricity consumption charges are to be paid by the respondent. The learned Arbitrator has observed that in some of the contemporary contracts the term of the contract for recovery of electricity consumption charges is specifically mentioned and the tribunal has held that because such term is absent in the present contract the contractor is not liable to pay electricity consumption charges. The learned Counsel appearing for petitioner has referred to the correspondence exchanged between the parties and has pointed out that in that correspondence the respondent-contractor had raised objection about recovery towards deduction of demand charges, PF penalty charges and not for the deduction of charges for consumption of electricity from the contractor. The learned Counsel submits that the correspondence exchanged between the parties and the terms of the contract clearly shows that so far as charges for the electricity consumed were to be born by the contractor. The learned Counsel appearing for respondent on the other hand does not dispute the

correspondence exchanged between the parties which is placed on record. Though according to him, one letter dated 8.10.1992 from the respondent to the petitioner was not brought on record, he does not dispute that correspondence between the parties has not been considered by the learned Arbitrator. According to the learned Counsel what has been done by the learned Arbitrator is that he has construed the terms of the contract and the construction placed by the learned Arbitrator on the terms of the contract is a possible construction, and therefore, in the limited jurisdiction of this Court under Section 34 of the Arbitration and Conciliation Act, the Award should not be disturbed.

2. Now so far as the terms of the contract are concerned, in my opinion, there are two terms of the contract which are relevant, they are term nos.10.2 and 10.5. They read as under:-

> "10.2. Approach to the lower portal of tunnel is possible through a village road taking off the Jaigad road, almost upto 200 metres from the tunnel face. The Contractor will have to make a service road from this road as found necessary. Suitable area for dumping the excavated tunnel muck and for the camp site of the Contractor (about 700 sq.M.) is also available. The Corporation will hand over this area to the Contractor in time to keep the progress of

> work. Similarly Corporation will also arrange for high tension power connection which would be made available to the Contractor within 200 metres of the face of the tunnel.
>
> 10.5 All charges connected with tapping/developing and maintaining site facilities are entirely to be borne by the Contractor within his quoted rate structure and the Corporation will lend its good offices towards expediting the work without any liability therefor."

It is clear from the above quoted clauses that high tension power connection was to be made available to the contractor by the petitioner and it was for the contractor to maintain the site and all the charges that may be necessary for tapping/developing, maintaining site were to be borne by the contractor. By letter dated 24.8.1992, which is admittedly on record, the respondent was informed by the Dy. Chief Engineer of the petitioner that all the charges in connection with electricity power connection are to be borne by the contractor. That letter was replied to by the respondent. The reply is dated 8.9.1992. Three paragraphs of this letter are relevant. They read as under:-

> " In this connection we would like to bring to your kind notice that at no place our tender specify recovery towards demand charges, P.F.Penalty

> charges etc. and hence we have not considered these while quoting for the above job.
>
> I would be pertinent to you would appreciate if we add here that it is brought to our notice that condition regarding recovery towards P.F.penalty etc. is included in some of the contracts awarded to other agencies working for Konkan Railway Project.
>
> In the light of the above we request your goodself to reconsider your decision and refund all the excess amount recovered from our R.A.Bills towards electicity."

Perusal of this letter shows that when the petitioner told the respondent categorically that all charges in connection with the electricity are to be borne by the contractor, the respondent-contractor was making grievance about only being required to pay demand charges and penalty charges and he requested refund of the excess amount deducted from R.A.Bills only on that account. There is one more letter on record i.e. letter dated 27.9.1992 addressed to the petitioner by the respondent. In this letter a grievance is made about recovery of increase rate of electricity charges. In paragraph (2) of that letter it is stated thus:-

> "It may kindly be noted that we have not provided in our contracted rates such sudden and steep raise in electricity charges and hence, we are constrained to add here that we do not accept the above

> recovery and we request you to kindly refund the excess recovery made on this account."

It appears that earlier the electricity consumption charges were recovered at the rate of 1.15 per unit but thereafter the consumption charges were increased from Rs.1.15 per unit to Rs.1.85 per unit. The respondent states that while submitting its contract it had taken the rate of Rs.1.15 per unit into consideration and therefore, they are liable to pay at that rate and not at the rate of Rs.1.85 per unit. Thus, it is clear that the respondent has clearly stated that while submitting its tender the respondent had taken into consideration the fact that the respondent will be required to pay electricity consumption charges. One more paragraph of this letter is relevant which reads as under:-

> " In view of the temporary suspension of the work, we request that no recovery towards electricity be done at these places till normal working activity is resumed."

This paragraph in my opinion, takes the matter beyond any doubt that the only objection of the respondent was that the respondent is not liable to pay demand charges, penalty charges and increased rate of electricity. It was an admitted position that the respondent is liable to pay electricity consumption charges and that it had taken into consideration electricity consumption charges while submitting their tender. The correspondence between the parties, thus was relevant for

the conclusion to be reached about the claim made by the respondent. The Arbitrator also was obliged to take into consideration the correspondence between the parties because it shows as to how the respondent itself understood the terms of the contract. When a quasi judicial authority excludes from its consideration relevant material, the finding recorded by excluding relevant material suffers from violation of principles of natural justice and therefore, the finding becomes infirm and becomes liable to be set aside. Therefore, the award made against claim no.5 cannot be sustained. At this stage it may be pointed out that the learned Counsel appearing for respondent had submitted that order under sub-section (4) of Section 34 of the Arbitration Act can be made so that material which is not considered by the learned Arbitrator could be considered by the learned Arbitrator. In my opinion, no useful purpose would be served by making order under sub-section (4) of Section 34 of the Act in this matter, firstly because the material was available on record and the material which has been excluded from consideration is so obvious that the claim cannot be sustained and has to be rejected. Therefore, in my opinion, there is no useful purpose will be served by making order under sub-section (4) of Section 34 of the Act.

3. The petitioner also challenges the Award made against claim no.6. The claim no.6 was for reimbursement of difference

between price variation on account of increase in minimum wages.. The claim of the respondent was that as per the terms of the contract the respondent is liable to pay minimum wages to the labour engaged for carrying out the work under the contract. There was steep rise in minimum wages payable to the labour and therefore, he is entitled to the compensation. The Award made by the learned Arbitrator in this regard reads as under:-

> "5.6 Claim for reimbursement of difference between Price Variation on account of increase in Minimum Wages. Total of Claim no.6=Rs.79,43,068/-
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> (a) The compliance of Minimum Wages Act,1948 was to be ensured by the Claimants in terms of provision in Para 52.1 of the GCC of this Contract. Non-compliance of the provisions in this Act and rules made thereon carry severe punishment. Therefore, both the Claimants and Respondents were jointly and severally responsible for such compliance.
>
> (b) The minimum wages in specified trades are notified by the Competent Authority from time to time depending upon inflation, working conditions in areas of work locations, skill required for works, working conditions in performance of jobs etc. In an inflationary economy as it was during this Contract period, the Minimum Wages generally exceeded indexing of wages based on Consumer Price Indices because these are not location and job

specific where as the Notified Minimum Wages are location and job specific.

(c) Respondent stated that the contract specifically provides for price variation clause and all the payments as per this clause were admitted and paid to the claimants. As per this clause, no other escalation is admissible.

(d) The details of Minimum Wages for Unskilled labour submitted by the Claimants indicated an increase of wages from Rs.39.40/ day in July91 to Rs.68.45/ day in December,95 i.e. by 74%. As 45% was the weightage for labour in this tunnel work, such steep increase it is felt, would have substantially effected cash inflow of the Claimants. This alone resulted in a difference of Rs.65,94,181/- in price variation payment on basis of Minimum Wages and Wages as per CPI in the period of Nov,91 to July,95. The tribunal observes that the increase in minimum wages notified by the Competent Authority of the relevant area during this period has not been compensated by the price variation clause. The minimum wages is a statutory requirement. Claimant thus needed to be compensated for steep increase in labour cost which was beyond their control but were obliged to pay according to Para 52.1 of GCC and under Statutory Provisions of Min. Wages Act 1936.

> (d) Respondents had already paid a sum of Rs.1,28,57,273/- as escalation payment as per the PVC; as against a sum of Rs.1,94,23,771/- claimed by the claimants. The difference between the two amounts is Rs.65,66,498/- which Tribunal considers as justifiably payable to the Claimants.
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> (e) Amount awarded for Claim No.6 = Rs.65,66.,478/-"

Perusal of the above quoted portion of the Award shows that according to the learned Arbitrator because of the requirement of law the contractor was required to pay minimum wages as statute obliges the contractor to pay the same and as there was steep rise in the the minimum wages, he was required to pay in accordance with paragraph 52.1 of the General Conditions of the Contract and the minimum wages Act and therefore, the contractor was entitled to reimbursement. Perusal of the Award also shows that the objection raised by the petitioner to this claim was that there is specific term in the contract which provides that the contractor cannot claim any compensation on account of price variation and therefore, no escalation is admissible. Perusal of the Award also shows that this aspect of the matter has not been considered by the learned Arbitrator while allowing this claim. The learned Counsel appearing for petitioner relied on three judgments, two of the Supreme Court and one of Hight Court of Orisa. The first judgment relied on by the learned

Counsel appearing for petitioner is the judgment of the Supreme court in the case of "Tarapore & Co. vs. State of M.P., (1994) 3 Supreme Court Cases 521". Then second judgment is in the case of "State of Rajasthan Vs. Nav Bharat Construction Co., (2006) 1 Supreme Court Cases 86", and the third judgment is of the learned Single Judge of the Orissa High Court in the case of "State of Orissa Vs. Birat Chandra Dagara, AIR 1997 ORISSA 142".

4. Clause 28.1 of the Special conditions of the contract is relevant which reads as under:-

> "28.1 The rates quoted by tenderer and accepted by the Corporation shall hold good till the completion of the work and no additional, individual claim shall be admissible on account of fluctuation in market rates, increase in taxes/any other levies/tolls etc., except that payment/recovery for overall market situation shall be made as per price variation clauses given below."

Perusal of the reply filed by the petitioner shows that the petitioner had specifically referred to clause 28 of the special conditions of the contract quoted above to claim that because of the rise in the minimum wages no compensation can be claimed by the contractor. But perusal of the Award shows that the learned Arbitrator has not considered clause 28. Perusal of the judgment of the Supreme Court in

the case "Tarapore & Co." referred to above shows that the Supreme Court in paragraph 26 has noted the difference between fair wages and minimum wages and has noticed that minimum wages are required to be paid as a mandate of law, and therefore, requirement to pay minimum wages cannot be equated with the requirement to pay fair wages and in the case before the Supreme Court requirement was for fair wages and not for minimum wages. Perusal of the paragraph 27 of the judgment of the Supreme Court in the case "Tarapore & Co." shows that in that case the respondent who had invited tenders had asked the parties to take into account the fair wages notified at the time of inviting tenders. In the present case there is no requirement to pay fair wages and it is nobody's case that the petitioner required that the respondent and other tenderers to take into consideration the rate of minimum wages in existence at the time of submitting tender. The judgment in the case of “State of Rajasthan” shows that in that judgment merely judgment in the case of "Taraporwala & Co." has been followed. In my opinion, in the face of clause 28.1 quoted above, no increase in the minimum wages was liable to be compensated by the petitioner. In any case clause 28 is not only relied on by the petitioner specifically in the reply but it was also relevant and material for deciding the entire case of the respondent to get compensation. Therefore, as observed above it was the duty of the learned Arbitrator to take into consideration that relevant material. Excluding relevant

material from consideration by the learned Arbitrator vitiates the Award because the findings recorded by the learned arbitrator are the findings recorded in violation of principles of natural justice. Therefore, the award made by the learned Arbitrator against claim no.6 is also liable to be set aside.

5. The petitioner also challenges the Award made against claim no.8. The claim no.8 was for recovery of extra cost incurred by the contractor in excavation in soft strata of tunnel from Bhoke Portal Side. The case of the contractor was that while excavating the tunnel the contractor came across soft strata, while on the basis of geo-technical appraisal given in the bid documents it was indicated that while excavating the tunnel the excavator is likely to come across amygdular basalt. In drifting, the respondent came across soft basalt and for that it has incurred additional expenses. A part of the amount demanded on this count was paid by the petitioner. For the balance, the contractor has made the claim. The defence of the respondent was that clause (4) of the Special Condition of the Contract negates the grant of such compensation. It was stated that the additional payment was made on this count by the petitioner as a good gesture and that cannot be made basis for making a claim. The Award made by the learned Arbitrator reads as under:-

"5.8 Extra Cost in Excavation in soft strata of

Tunnel from Bhoke Portal side. Total amount of Claim No.8 = Rs.2,96,74,091/-

(a) Geo-technical Appraisal given in the bid documents somehow made the Claimants to believe that the entire alignment of KARBUDE tunnel was passing through amygdular basalt with moderately spaced joints which made it a good tunneling media. However on ground, the strata encountered was not rock/dense basalt but laterite and soft material throughout in 400 metres length from Bhoke side.

(b) This required much more efforts forcing the Claimants to resort to multi-drift method of tunneling with fore-poling, use of vertical and horizontal struts in drifts, consolidation grouting and even suspension of work during heavy seepage of water with consequent removal of this water and strengthening of supports in position. This did not permit any proper drilling cycle and targeted progress of 50 metres per month could not be achieved in these circumstances. Claimants' with use of their own equipments achieved a progress of only 400 metres in 30 months with lot of infructuous expenses.

(c) Para 2.3 of Appendix “A” to the Agreement stated that boreholes indicated the whole length of the Tunnel lying in Deccan Trap Basalt Structure with no significant stratification except at both ends where permanent lining to a length of 100 metres might be necessary. So

obviously, the Claimants had based their quoted rates on this premise. A significant change in geological structure from reasonably hard rock to laterite and soft material would force any working agency to change tunneling methodology and would incur extra cost in excavation, structural support, controlling seepage if any with very elaborate safety measures etc. and the overall cost could be 2 to 3 times cost of tunneling in comparatively hard strata in similar working conditions.

(d)(i) The representations of the Claimants for rate revision were rejected by the Respondents and in their rejoinder to claims submitted by the Claimants, the Respondents submitted that benefits to the tune of Rs.106.5/CM against original rates of Rs.325/- had already been given to them.

Respondents further contended that the Claimant's claimed a rate of 1325/CM which was exorbitant and unsupported with any reasoning. The Claimants, however, submitted the rate analysis @ Rs.1494.42/CM along with affidavit dated 13.08.2004 of Shri.S.Ramprasad, the Claimant's Project Manager of the work concerned.

To this the Claimants submitted that they had accepted the said benefit as partial relief to ameliorate the financial difficulties at that moment of time and not as total relief.

(ii) The Arbitral Tribunal is of the opinion that any rate of tunneling in hard rock strata is unworkable for tunneling in soft rock strata and the

Claimants definitely needed relief in this regard.

(iii) Considering a conservative multiplier of Two to the rate of hard rock tunneling to make it workable for soft rock tunneling, this works to Rs.650/CM(which is considered inclusive of element of escalation) for soft rock tunneling with the Claimants own tunneling equipments. Considering same quantities as in enclosure to the Claimants letter No.KRT/6D/236/97 of 19.04.1997 compensation due to the Claimants would be:

(17,200 + 1,663)X Rs.650 i.e. Rs.1,22,60,950 less amount already paid i.e. Rs.65,77,861 which works out to approx. Rs.56.83 lacs.

(e) Amount Awarded for Claim No.8= Rs.56.83 lakhs."

Perusal of the above quoted Award shows that practically there is no reason given by the learned Arbitrator for awarding the claim. Clause (4) of the Special Conditions of the Contract which was relied on by the petitioner is totally excluded from consideration. The clause (3) and (4) of the Special Specifications for Tunneling which was relied on by the petitioner read as under:-

"3. The material through which the tunnel will be excavated is presumed to belong generally to "Basalt" (typical Deccan Trap) The contractor should quote an overall rate for all classes of rock/soils and no extra payment will be made for

> variation in rock/soil. Charts for Bore holes taken in each tunnel location are enclosed as Annexure separately.
>
> 4. The accepted rates for Tunnel excavation will hold good for all excavations irrespective of the type of rock of soil encountered in the tunnel."

Perusal of the above quoted clauses shows that the petitioner presumes that the material through which the tunnel has to be excavated belongs generally to basalt, but the contractor should quote overall rate for all classes of rock and that no extra payment will be made for variation in the rock / soil. Clause (4) put the matter beyond all doubt that the accepted rates for tunnel excavation are to be held good for all excavations irrespective of the type of rock or soil encountered in the tunnel. In the Award the learned Arbitrator simply excludes from its consideration clauses (3) and (4) quoted above. What is further to be seen is that the very basis of claim made by the respondent was that from the geo-technical appraisal given in the bid documents the respondent had formed opinion that during excavation the claimant-respondent would came across only one type of rock. But perusal of the instructions given in the tender which are part of the record shows that the petitioner had asked all the tenderer to visit the site of work and ascertain the conditions of the work viz. nature of soil etc. which they are likely to come across and the respondent had given

a declaration that the respondent has inspected the site of the work and has fully familiarised itself with all aspects of constructional features, working conditions, geo-physical/terrain conditions etc. Thus, as the tender was submitted after the physical verification of the site/soil there was no scope for forming opinion on the basis of geo-technical appraisal. In my opinion, conditions (3) and (4) quoted above prohibit grant of any excavation in this regard. The finding recorded by the learned Arbitrator in this regard not only suffers from non application of mind to the important and relevant aspect of the matter but, in my opinion, it is also perverse, and therefore, is liable to be set aside.

6. For all these reasons therefore, the petition succeeds and is allowed. The petition is granted in terms of prayer clause (a). The respondent to pay costs of this petition to the petitioner as incurred by the petitioner.